bill and being the same referred to in bill and answer as the schedule form containing about one hundred and thirty a cash, and such a commission to have the same force and effect as if the same was regularly filed under the Commission issued in this cause subpoenaed to be read exceptions

R H Alvey Solr for Complainant,
William H Hamilton atty for Sarah Brewer and wife
J S Clagett, Guardian for infants & atty for John S Cushing heirs
Geo W Smith Solr for heirs of Thos S Cushing

Whereupon the proceedings in the premises aforesaid being read and fully considered by the Court and due deliberation being thereupon had the said Court passed the following Opinion and Order dismissing the Bill to wit, The object of the bill in this case which was filed on the 22d day of April 1852 is to vacate a deed executed by Benjamin Cushing to his brother John Cushing Nov 14th 1826 From the pleadings and evidence in the cause it appears that Benjamin Cushing died for the benefit of the Insolvent Laws Sept 19th 1826 That John Cushing was appointed his permanent Trustee and that at the March Term of Washington County Court 1827 Henry Seibert one of the Creditors of said Benjamin filed allegations against Benjamin upon which issues were joined and a verdict of guilty found by the Jury by which verdict Benjamin was prevented from receiving his final discharge, That John Cushing professing to be Trustee died during the year 1845 leaving two children John S Cushing and Elizabeth intermarried with Sarah Brewer, and that upon the petition of Henry Rickenbaugh a creditor of Benjamin to the amount of some two or three hundred dollars William Seitz was appointed in 1847 successor to said John & this filed in 1852 the Bill in this case against the said representative of John & further appears that William Seitz Trustee died in 1855 and that Solomon Feight was appointed his successor who soon declared by trust and in pursuance 1858 Andrew K Syester was appointed Trustee who in June 1863 filed his Bond and entered upon the duties of his trust. And this Trustee is now prosecuting this suit for the purpose of vacating the deed of Benjamin to John executed November 14th 1826.

The bill alleges that said deed was made by Benjamin to John with a view or under the expectation of taking the benefit of the insolvent law and with intent thereby to give an undue and improper preference to the said John the grantee of said deed and it is therefore null and void. It further alleges that said deed to John was duly executed acknowledged and recorded conveying a valuable real estate in payment of a debt due from Benjamin to John That John took possession of a part of said real estate soon after the conveyance consisting of some 130 acres and that Benjamin remained in possession of the balance to the day of his death in 1848 taking and using the profits thereof. The bill further alleges that the Children of Benjamin are in possession of his home farm claiming said land under the deed of Benjamin as his devisees and alleges that the deed of November 14th 1826 was never intended to be an absolute deed but to operate merely as a Mortgage to secure the payment of debt owing by Benjamin to John which debt was subsequently paid and a considerable part thereof and reduced to $4689 for which amount Benjamin gave his note to John upon which judgment was obtained which is filed as an exhibit in this cause. The prayer of the bill are that the deed may be set aside by decree of this Court and declared null and void and that an account may be taken of the rents and profits of said real estate & if this Court should not consider the deed absolutely void but only an equitable mortgage for the purpose of securing the said John the payment of his debts that then the said property may be decreed to be sold by his Trustee for the payment

of the balance of the Mortgage debt and after the return of the purchase money to the payment of the claims of the other Creditors of said insolvent debtor according to law.

The Bill further prays that the heirs of John may be enjoined from prosecuting a pending judgment suit against the heirs of Benjamin for the recovery of that portion of the land in their possession. The bill then calls upon the heirs at law of John Cushing deceased to answer under oath the allegations of the Bill and the following special interrogatories. Whether John was a creditor of Benjamin and to what extent. Whether Benjamin remained in possession of any part of the property conveyed after said deed how long and whether he paid any rent for the same? Whether John took possession of any part of the land conveyed and which they are now claiming under said deed from Benjamin. Whether John Cushing did not state before his death that said deed was only intended as a Mortgage to secure a debt owing by Benjamin to John and not as an absolute deed? Whether a settlement had not taken place between John and Benjamin of all their accounts, including the consideration of said deed on which settlement it was ascertained that the balance due said John was the amount of said note on which judgment was obtained? That any may set forth and show so far as they have it in their power the amount of debts that were due and owing from Benjamin to John at the time said deed was made, To the bill the defendants filed their answer under oath Sept 17 1852 and so far as the same is responsive to the allegations and special interrogatories therein must be taken as true unless overcome by superior evidence. At this stage of this opinion I only propose to notice so much of this answer as responds to the allegation that the deed not sought to be vacated was not intended by Benjamin to be an absolute deed but only a Mortgage to secure his indebtedness to John and calling the defendants to answer whether John Cushing the grantee did not state before his death that said deed was only intended as a Mortgage and not an absolute deed and whether the note of $4689 upon which judgment was obtained was obtained and filed as an exhibit was not given by Benjamin to John as a full settlement of their accounts including the consideration of said deed as a balance due and such settlement. The answer to these interrogatories deny in the most positive terms that the deed was ever intended only as a Mortgage but was an absolute deed, and that they claimed the land so conveyed by descent from their father John Cushing and had not recovered the same in a judgment suit by a verdict in their favor against the heirs of said Benjamin. They answer further denies in the most positive manner that any part of the consideration of said deed had ever been paid back to John by any settlement and that the note exhibited so far from being a balance due from Benjamin to John as a reduction mentioned in the said deed was in fact money paid by John in addition to the consideration mentioned in said deed for the use of Benjamin a part of which amounting to about the sum of $2.800 was paid to Henry Seibert a creditor of Benjamin who had sent to prison and was paid for the purpose of securing his release, The defendants further say that they frequently heard their father complain that his brother Benjamin did not pay the rent and that he could get nothing out of him but some training.

The answer in this respect being responsive to the Bill and a direct denial of the allegation that the deed was intended only as a Mortgage and there not being a particle of evidence in this cause to sustain the allegation I am clearly of the opinion that the deed of Nov 16th 1826, is an absolute deed and cannot by any evidence in this cause be construed to have been intended only as an equitable Mortgage. The next and most important question to be decided is the deed of Nov 16th 1826 fraudulent and void. The Bill by numerous allegations attempts to impeach this deed as being fraudulent at Common law, or under the Statutes of Elizabeth and to this end